2-5-2015

Ramirez v. State Appellant's Brief Dckt. 42378

IN THE SUPREME COURT OF THE STATE OF IDAHO

RAMIRO RAMIREZ, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	S. Ct. No. 42378 D.Ct. No. 2014-513 (Jerome County)

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fifth
Judicial District of the State of Idaho
In and For the County of Jerome

HONORABLE JOHN K. BUTLER
Presiding Judge

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A. Nature of the Case

This is an appeal from the summary dismissal of Mr. Ramiro Ramirez's first successive petition for post-conviction relief. The order of summary dismissal should be reversed and the case remanded for further proceedings for three reasons: 1) the district court erred in failing to appoint counsel; 2) the district court erred in summarily dismissing given no answer or other indication from the state that it objected to the request for post-conviction relief; and 3) the district court erred in concluding that *Murphy v. State,* 156 Idaho 389, 327 P.3d 365 (2014), applied to this case as Mr. Ramirez has never been afforded post-conviction counsel and thus has never had any meaningful opportunity to have his claims heard.

B. Procedural History and Statement of Facts

On July 12, 2008, Mr. Ramirez and a co-defendant were found guilty of burglary and acquitted of aiding and abetting aggravated assault and aiding and abetting attempted robbery. Mr. Ramirez appealed. R 22.

The State Appellate Public Defender (SAPD) was appointed and two issues were raised on appeal: 1) whether the court erred in denying a motion for a mistrial; and 2) whether the sentence imposed was excessive. Relief was denied in an unpublished opinion. *State v. Ramirez,* 2011 Unpublished Opinion No. 447. R 22.[1]

Mr. Ramirez filed a timely petition for post-conviction relief along with a motion for appointment of counsel. Mr. Ramirez raised claims of ineffective assistance of appellate counsel

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[1] The district court took judicial notice of this opinion and the opinion in the appeal from the original post-conviction dismissal in this post-conviction case. R 36. Mr. Ramirez has filed a motion to augment the record in this appeal with those opinions.

for failure to raise several issues in direct appeal, including district court error in denying Mr. Ramirez's motion to suppress the victims' "identifications" of himself and the co-defendant because of unduly suggestive identification procedures. The district court denied the request for counsel and summarily dismissed the petition. R 22.

Mr. Ramirez appealed and relief was denied in an unpublished opinion. *Ramirez v. State,* 2014 Unpublished Opinion No. 401, filed March 3, 2014. R 22.

On May 30, 2014, Mr. Ramirez filed a successive petition for post-conviction relief. R 3-11. He raised this claim:

> I assert that the district court erred in allowing the state to elicit testimony of my co-defendant's refusal to talk to police at the scene of the arrest and I contend that the error was not harmless. Therefore, counsel ignored issues that are clearly stronger than those presented in my ~~appeal~~ post-conviction appeal.

R 5.

Mr. Ramirez accompanied his petition with an affidavit, R 8-11, setting out the error in the trial court and requesting the appointment of counsel "to give me an opportunity with counsel to properly allege the necessary supporting facts for my claim, because I lack the skills and knowledge to represent myself. Thank you very much." R 11.

Mr. Ramirez also filed a separate motion and affidavit in support for appointment of counsel. R 12-15.

The state never filed an answer or any other document in the case. R 2.

The court filed a notice of intent to dismiss. R 21-28. In the notice, the court took judicial notice of the unpublished opinion issued on direct appeal and the unpublished opinion issued on the appeal from the denial of post-conviction relief. The court also denied counsel for

this successive petition writing:

> The petitioner's successive petition alleges that the trial court erred in allowing admission of statements of his co-defendant and that the attorney who handled the appeal of the dismissal of his original post-conviction relief petition was ineffective in failing to raise that issue on appeal. The petition is raising for the first time an issue that could have been presented and was not raised in his original petition. The petitioner has not presented any sufficient reason as to why he did not raise this issue in his original petition for post-conviction relief. Therefore, the court must find the second successive petition to be frivolous and there is no legal basis for the appointment of counsel. The Motion for Appointment of Counsel is DENIED.

R 25.

With regard to its intent to summarily dismiss the petition, the court first wrote that the petitioner's claims were untimely because Mr. Ramirez had failed to set forth "sufficient reasons" as to why his claims had not been raised or were inadequately raised in his initial petition. R 26.

The court then stated that Mr. Ramirez was alleging ineffective assistance of post-conviction counsel. The court stated that it would summarily dismiss this claim because 1) there is no constitutionally protected right to effective assistance of counsel in post-conviction; 2) the claim of error in allowing testimony at trial regarding the co-defendant's statements "was not preserved for appeal of the dismissal of his 2012 petition for post-conviction relief. . . . An allegation of ineffective assistance of appellate counsel is not a cognizable ground for relief under the UPCPA."; and 3) "since the petitioner failed to raise the issue of the district court's error relative to the testimony of the statements of the co-defendant in his original petition, there was no issue reserved for appeal on the denial of his original petition for post-conviction relief." R 27.

Mr. Ramirez filed a timely response which he labeled "Motion to Reply Notice of Intent to Dismiss." R 30-32. In his response, Mr. Ramirez stated:

> . . . I seek modification with my motion to respond. With this motion to respond I would like to correct allegations of ineffective assistance of counsel, of prior post-conviction appeal.
>
> The allegations for ineffective assistance of counsel are due to my direct appeal counsel. I was unclear with the procedures of my second successive petition. Therefore, I pray the court can disregard the allegations of inffective [sic] assistance of counsel, of prior post-conviction appeal.
>
> Therefore, the reason for not asserting the grounds in the earlier petition is because I didn't know of these grounds at the time of first petition. I also lack the skills and knowledge to represent myself, and with limited access to legal material. However, I didn't have an attorney to represent me in the proceeding, to provide a post-conviction application with meaningful opportunity to have my claims presented, and to help me point out errors.

R 30-31.

Mr. Ramirez closed his response with a second request for counsel "in order to give me an opportunity with counsel to properly allege the necessary supporting facts. Thank you very much." R 32.

The district court thereafter issued its memorandum decision and order summarily dismissing Mr. Ramirez's petition. R 33-40.

The court first stated as a basis for dismissal that from his response, it appeared that Mr. Ramirez wished to "amend his petition to allege ineffective assistance of his appellate counsel on his direct appeal and not as to his appellate counsel on his post-conviction appeal." R 34. The court held that "to the extent that the petitioner seeks to amend his successive petition," the request was "without merit" and was denied. Citing *Cowger v. State,* 132 Idaho 681, 686-87, 978 P.2d 241, 246-47 (Ct. App. 1999), the court noted that to raise additional issues, an amended

petition must be filed. The court then stated in a footnote that even if it were to consider a claim of ineffective assistance of direct appeal counsel, the claim would be untimely and forfeited because it was not raised in the initial petition. R 37.

The court then dismissed Mr. Ramirez's petition writing that Mr. Ramirez was aware of any error in allowing in identification evidence at the time of the trial and that he was aware of the issues raised on appeal at the time of appeal. Therefore, the court concluded, "The petitioner had a meaningful opportunity to assert all claims he wanted to assert in his original petition. A mere lack of knowledge of the law is not a sufficient reason as to why this claim was not presented in his original petition." The court cited *Murphy v. State,* 156 Idaho 389, 327 P.3d 365 (2014), in a footnote in support of its decision. R 39.

While the court noted that it had denied the first request for counsel subject to reconsideration, the court did not ever specifically deny or acknowledge the second request for counsel included in the response to the notice of intent to summarily dismiss. R 33.

A final judgment was entered. R 42. This appeal timely follows. R 44-48.

III. ISSUES PRESENTED ON APPEAL

A. Did the district court err in failing to appoint counsel?

B. Did the district court err in summarily dismissing in the absence of any answer or other document filed by the state?

C. Did the district court err in dismissing the successive petition given Mr. Ramirez never had a meaningful opportunity to present his claims?

IV. ARGUMENT

A. The District Court Erred in Refusing to Appoint Counsel

Mr. Ramirez requested appointment of counsel twice - once when he filed his petition and again in his response to the notice of intent to summarily dismiss. The court denied the first request in its notice of intent to dismiss. In its memorandum decision and order of summary dismissal, the court recognized its earlier denial of counsel but did not acknowledge or specifically deny the second request for counsel. The district court's failure to appoint counsel was, however, error because Mr. Ramirez did set forth facts giving rise to the possibility of a valid post-conviction claim.

If a post-conviction petitioner is unable to pay for legal representation, counsel may be appointed at public expense. I.C. § 19-4904. Although the decision to grant or deny counsel is discretionary, counsel should be appointed if the petitioner qualifies financially and "alleges facts to raise the possibility of a valid claim." *Judd v. State,* 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009), quoting *Charboneau v. State,* 140 Idaho 789, 794, 102 P.3d 1108, 1113 (2004). *See also, Plant v. State,* 143 Idaho 758, 761, 152 P.3d 629, 632 (Ct. App. 2006).

In assessing whether the possibility of a valid claim has been raised, the district court must afford leniency to *pro se* petitioners whose petitions may be inartful and incomplete. *Plant,* 143 Idaho at 761, 152 P.3d at 632.

> [T]he trial court should keep in mind that petitions and affidavits filed by a *pro se* petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the *pro se* petitioner simply does not know what are the essential elements of the claim.

Charboneau, 140 Idaho at 793, 102 P.3d at 1111.

Every inference is to be drawn in favor of the *pro se* petitioner who cannot be expected to know how to properly allege the necessary facts. *Plant, supra.* A *pro se* petitioner need not allege facts to support every element of a valid claim to obtain counsel; rather, it is sufficient to have alleged facts supporting some of the elements of a valid claim. *Brown v. State,* 135 Idaho 676, 679, 23 P.3d 138, 141 (2001), superseded in part by statute as stated in *Charboneau v. State,* 140 Idaho at 792 ftnt. 1, 102 P.3d at 1111, ftnt. 1.

The decision on whether to appoint counsel and the decision of whether to summarily dismiss a petition are governed by two different standards. *Swader v. State,* 143 Idaho 651, 654-55, 152, P.3d 12, 15-16 (2007). In determining whether to appoint counsel, the court considers only whether there is a possibility of a valid claim, considering circumstances which might prevent the petitioner from making a more complete investigation into the facts. In a decision of the merits, the court must consider whether a claim has been made. *Id.*

In this case, Mr. Ramirez alleged error in the admission of testimony regarding his co-defendant's refusal to talk to the police. Both the Fifth Amendment as applied to the states through the Fourteenth Amendment and Article I, Section 13, of the Idaho Constitution guarantee a criminal defendant the right not to be compelled to testify against himself. This right also bars a prosecutor from commenting on a defendant's invocation of that right. *Grifin v. California,* 360 U.S. 609, 614 (1965). A prosecutor may not use evidence of post-arrest, post-*Miranda* silence for either impeachment, *Doyle v. Ohio,* 426 U.S. 610, 619 (1975), or as substantive evidence of guilt in the State's case-in-chief, *Wainwright v. Greenfield,* 474 U.S. 284, 292 (1986). *See also, State v. Ellington,* 151 Idaho 53, 60, 253 P.3d 727, 734 (2011). If the evidence presented regarding the co-defendant's invocation of the constitutional right to remain silent

could be imputed by the jury to Mr. Ramirez, then presentation of the evidence would have been improper. And, if this evidence was improperly admitted, there is both a possibility of ineffective assistance of trial counsel as well as a possibility of ineffective assistance of appellate counsel, if the error amounted to fundamental error. *See State v. Perry,* 150 Idaho 209, 245 P.3d 961 (2010).

State v. Major, 105 Idaho 4, 665 P.2d 703 (Ct. App. 1983), is instructive. In *Major,* the prosecutor called a witness to the stand who claimed his Fifth Amendment privilege. While the Court did not find fundamental error given the particular facts of Major's case, the Court noted that reversible error does occur when the witness is an accomplice of the defendant, this fact was known to the jury, the prosecutor knew the witness would claim his Fifth Amendment right, and the prosecutor persisted in asking questions regarding the crime with which the defendant was charged. The Court cited *Robbins v. Small,* 371 F.2d 793 (1st Cir. 1967), *cert. denied* 386 U.S. 1033, 87 S.Ct. 1483; *United States v. King,* 461 F.2d 53 (8th Cir. 1972); *Shockley v. State,* 335 So.2d 269 (Ala. Cr. App. 1975), *aff'd* 335 So.2d 663 (Ala. 1976); *People v. Giacalone,* 399 Mich. 642, 250 N.W.2d 492 (Mich. 1977).

Moreover, it is clearly erroneous to allow evidence of postarrest silence to be admitted at trial for the purpose of raising an inference of guilt. *State v. White,* 97 Idaho 708, 551 P.2d 1344 (1976). Even using the evidence for impeachment purposes is a due process violation. *Doyle v. Ohio,* 426 U.S. 610, 618, 96 S.Ct. 2240, 2245 (1976). *See also, State v. Moore,* 131 Idaho 814, 821, 965 P.2d 174, 181 (1998) (Fifth Amendment rights are applicable pre-arrest and pre-*Miranda*[2] warnings and evidence of the exercise of the rights may not be admitted to imply

[2] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

guilt); *State v. Timmons,* 145 Idaho 279, 290-91, 178 P.3d 644, 655-56 (Ct. App. 2007) (the defendant's exercise of the Fifth Amendment right to remain silent either before or after arrest may not be used in the state's case-in-chief for the purpose of inferring guilt.)

In his affidavit in support of his petition, Mr. Ramirez stated that his co-defendant, Mr. Digiallonardo, declined to speak with the police when their car was stopped by police. Counsel for Mr. Digiallonardo objected to admission of evidence of Mr. Digiallonardo's exercise of his Fifth Amendment rights at the joint trial. Even though the court ordered that such testimony not be admitted, the prosecutor elicited the prohibited testimony from the police officer at trial. R 66-67. Mr. Ramirez stated in his affidavit that the state had conceded that eliciting this testimony was error. R 66. And, indeed, *State v. Digiallonardo,* No. 35755, Unpublished Court of Appeals' Opinion issued November 5, 2010, confirms this allegation. At page 2 of the opinion, the Court of Appeals states, "The state concedes that allowing the state to elicit testimony regarding Digiallondardo's pre-*Miranda* silence was error." The Court went on to hold that even if the error had not been properly preserved, the error was fundamental error under *State v. Perry,* 150 Idaho 209, 245 P.3d 961 (2010), because there was a reasonable probability that the error affected the outcome of the trial. Mr. Digiallonardo's conviction from the joint trial was thus vacated.

Mr. Ramirez paraphrased language from the Court of Appeals' conclusion in its decision in *Digiallonardo* (Slip Op. page 4) in his affidavit:

> I assert that the nature of the erroneously admitted evidence was especially damaging in that unlike most erroneous admissions of evidence of a defendant's silence, it allowed the jury to make *two* potentially harmful inferences of guilt based both on my co-defendant's refusal to talk to the officer and also his

> indication as to why he was refusing to talk.[3] This fact, combined with the relatively inconclusive nature of the evidence linking me and my co-defendant to the crime, leaves a reasonable possiblity that the erroneously admitted evidence contributed to the verdict - and thus I conclude it was not harmless error.

R 66.

Mr. Ramirez's allegation was sufficient to establish the possibility of a valid claim, both as to ineffective assistance of his trial counsel in any failure to object to this error and as to his direct appeal counsel in failing to raise the error on appeal. Therefore, counsel should have been appointed. *Swader, supra.*

B. <u>The District Court Erred in Dismissing the Petition in the Absence of Any Answer or Other Pleading or Argument from the State</u>

The state filed nothing in this case - no answer, no motion for summary dismissal, no briefs.

The purpose of the requirement that the state file an answer within 30 days of the filing of the petition, I.C. § 19-4906, is so that any factual and legal issues before the district court can be properly framed, thus allowing the district court to make an intelligent ruling on the petition. *Fetterly v. State,* 121 Idaho 417, 418, 825 P.2d 1073, 1074 (1991). "When the state fails to respond the district court is operating without the benefit of such pleadings and is placed in the indefensible position of ruling on an application for post-conviction relief without any factual or legal issues first being framed." *Cherniwchan v. State,* 99 Idaho 128, 130 n. 2, 578 P.2d 244, 246 n. 2 (1978).

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[3] According to the *Digiallonardo* opinion, testimony was elicited that Mr. Digiallonardo told the officer that he did not want to speak with him because he had overheard a conversation on the patrol car radio indicating "the event that happened in Jerome and the connection of why we had stopped him." Slip Op. page 2.

Moreover, a pleading by the state is necessary if the state wishes to controvert any allegations in the petition. "Until controverted by the state, the allegations are deemed to be true." *Noel v. State,* 113 Idaho 92, 94, 741 P.2d 728, 730 (Ct. App. 1987). Uncontroverted allegations "must be deemed to be true, no matter how incredible they may appear to the trial court or to this [appellate] Court." *Smith v. State,* 94 Idaho 469, 472, 491 P.2d 733, 736 (1971), *overruled on other grounds by Kraft v. State,* 100 Idaho 671, 603 P.2d 1005 (1979). *See also, Parrott v. State,* 117 Idaho 272, 275, 787 P.2d 258, 260 (1990), noting that unrebutted allegations must be accepted as true.

The difficulty posed by the lack of a state's pleading is compounded when the state also fails, as it did here, to comply with I.C. § 19-4906(a), which provides: "If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record of portions thereof that are material to the questions raised in the application." The lack of the proper record cannot be attributed to the petitioner and the lack of a record can require vacation of a grant of summary dismissal. *Rodriguez v. State,* 122 Idaho 20, 22, 830 P.2d 531, 533 (Ct. App. 1992), superseded on other grounds by statute. *See Follinus v. State,* 127 Idaho 897, 908 P.2d 590 (Ct. App. 1995).

In this case, Mr. Ramirez alleged error in the admission of testimony regarding his co-defendant's refusal to talk to the police and error in the failure of appellate counsel to raise the issue as a matter of fundamental error. R 5. In his affidavit, Mr. Ramirez alleged that the state had conceded error in admission of the testimony. R 8. Mr. Ramirez further alleged, and noted that the state had not argued differently, that admission of the testimony was fundamental error. R 9. Mr. Ramirez further alleged that the error was not harmless because the co-defendant's

silence could have been viewed by the jury as evidence of a guilty conscience which provided a critical link in a case against Mr. Ramirez which was entirely circumstantial. Mr. Ramirez alleged, "I characterize the statements as highly incriminating as they 'implied guilt by informing the jury that my co-defendant wished to remain silent because he knew he was being investigated in connection with the incident at Dominos.'" R 8-9. Mr. Ramirez further alleged:

> Notably, the women never identified me or my co-defendant as one of the perpetrators. This is especially apparent given the discrepancies between the women's descriptions of the perpetrators and their vehicle and the characteristics of me and my co-defendant, that both of the perpetrators were initially identified as Hispanic, that clothes worn by the perpetrators were different from those worn by me and my co-defendant when we were stopped, and that there were various descriptions of the type of car driven by the perpetrators compared to the Honda that me and my co-defendant were stopped in. In addition, the weapon and masks or bandanas alleged used in the incident were never found - either in me or my co-defendant's vehicle or along the route that we would have taken from Dominos to the location where we were stopped by police.
>
> I assert that the nature of the erroneously admitted evidence was especially damaging in that unlike most erroneous admissions of evidence of a defendant's silence, it allowed the jury to make <u>two</u> potentially harmful inferences of guilt based both on my co-defendant's refusal to talk to the officer and also his indication as to why he was refusing to talk. This fact, combined with the relatively inconclusive nature of the evidence linking me and my co-defendant to the crime, leaves a reasonable possibility that the erroneously admitted evidence contributed to the verdict - and thus I conclude it was not harmless error.

R 10.

Given none of these allegations are disputed, the state's concession of error must be taken as fact. *Noel, supra*; *Smith supra.* That leaves only the question of harmlessness. With regard to that analysis, Mr. Ramirez's allegations that the evidence against him was all weak and circumstantial, including that neither he nor the car could be linked to the offense by the witnesses' testimony must likewise be taken as true and agreed to by the state. *Id.*

This situation is like that presented in *Rodriguez v. State, supra.* In *Rodriguez,* based upon the record presented by the petitioner's allegations, the appellate court was compelled to vacate the district court's order of dismissal. In *Rodriguez,* vacation was required because Rodriguez had alleged that he was not informed of the mandatory minimum sentence and the state failed to controvert the allegation. Here, Mr. Ramirez has alleged that the state has conceded error and further that the record supports a finding that the error was not harmless. The state has not controverted these allegations or provided a record to disprove the allegations and therefore summary dismissal was inappropriate. *Id.*

C. The District Court Erred in Dismissing the Successive Petition Given Mr. Ramirez Never Had a Meaningful Opportunity to Present His Claims

The district court dismissed Mr. Ramirez's petition on the basis that he failed to establish a sufficient reason for filing a successive petition. R 38. In particular, the court ruled that Mr. Ramirez had a meaningful opportunity to present all of his claims in his original petition and citing *Murphy* noted that he could not file a successive petition based upon the ineffective assistance of prior post-conviction appellate counsel. The district court's conclusion is flawed because Mr. Ramirez did not have the constitutionally required meaningful opportunity to present his claims.

The state does not have to provide any means of collateral review. Nonetheless if the state does chose, as Idaho has, to allow collateral review, that review must be conducted in accord with the constitutional requirements of due process and equal protection. *Evitts v. Lucey,* 469 U.S. 387, 401, 105 S.Ct. 830, 839 (1985). "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates

of the Constitution-and, in particular, in accord with the Due Process Clause." *Id.*

"'Due process' emphasizes fairness between the State and the individual dealing with the State." *Ross v. Moffitt,* 417 U.S. 600, 609, 94 S.Ct. 2437, 2443 (1974). "[F]undamental fairness entitles indigent defendant to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Ake v. Oklahoma,* 470 U.S. 68, 77, 105 S.Ct. 1087, 1093 (1985) (citation omitted).

Here, looking to *Murphy,* the district court held that Mr. Ramirez had enjoyed a meaningful opportunity to present his claims given he filed an initial petition. However, *Murphy* dealt only with a case wherein the petitioner had counsel appointed to assist her in both her initial and successive petitions. In this case, Mr. Ramirez never had any counsel appointed to assist him in either his first or successive petition.

As discussed above, *Charboneau* notes that *pro se* petitioners may fail to state their claims sufficiently because such claims cannot be sufficiently raised or because the claims are sufficient but the petitioner lacks the skill and knowledge needed to properly state them. In no way can it be said that a *pro se* petitioner has had a meaningful opportunity to present his claims when he has never been granted counsel to assist in raising the claims in a properly drafted petition. *Murphy* does not apply to this case. The application of *Murphy* to dismiss this petition is especially egregious given that Mr. Ramirez's co-defendant, tried jointly with him, had his conviction vacated based upon the error Mr. Ramirez is trying to present as a *pro se* litigant. This is not a case wherein there is no valid claim at issue. Mr. Ramirez's allegations were sufficient to establish a reason under I.C. § 19-4908 to allow a successive petition. Given the failure to ever appoint counsel, dismissal of Mr. Ramirez's successive petition is in contravention

of the requirements of fundamental fairness and due process.

V. CONCLUSION

For the reasons set forth above, Mr. Ramirez asks that this Court reverse the order of summary dismissal and remand for further proceedings.

Respectfully submitted this 5th day of February, 2015.

Deborah Whipple
Attorney for Ramiro Ramirez

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February 2015, I caused two true and correct copies of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to:

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Deborah Whipple